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In the

Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

CHRISTOPHER SLAVIN,

Petitioner.

REPLY PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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I. Respondents Opposition Avoids The Genuine Questions

In opposing this Petition, the People meander far and wide in avoiding the central questions of constitutional law created by the true subject of this Petition, the New York Court of Appeals' decision which improperly blended the well defined corporeal evidence exception with the more elusive act of production doctrine. Also, by raising new, yet unimportant questions to the Court it becomes readily apparent that the State would much prefer to avoid the genuine controversy and remain unresponsive to the arguments and reasoning presented in the Petition as opposed to confronting, head-on, the real constitutional issues created by the lower Court. However, to dilute the significance of this Petition, by attempting the slight of hand maneuver that is Respondent's opposition, is distressing.[1] Nevertheless, this office will remain circumspect.

[1] The Petitioner, relying on Court rule 14(G) which expressly provides that only facts "*material to consideration of the questions*" be included, did not set forth a full recitation of the facts established at trial. The State, ignoring this rule, has submitted a lopsided and misleading statement of facts that should be ignored. For instance, the State discloses that complaining witness Isreal Perez testified that the wound inflicted to his wrist started bleeding "*immediately*", like a "*hose*". However, he also testified that, after emerging from the basement where the attack purportedly occurred, he fell to the pavement, struggled with his assailants (with his hands touching the pavement) crossed a roadway and entered into a wooded area. What the People hide from the Court in their exceedingly selective statement of facts is that no serological evidence whatsoever was found in the basement, on the ramp, the roadway and most importantly on his wristwatch, which was found some 100 feet from where the wound was allegedly inflicted. The only rational conclusion that can be drawn from this scientifically established fact is that witness Perez was not telling the truth. Instances like this are replete throughout the trial record and it is safe to say that each and every forensic and scientific expert called by the People contradicted the "*facts*" testified to by both complaining witnesses. Equally misleading is the People's statement that the treating physician's affirmative response to a theoretical question as to whether a "*person could die from a blow to head*". What Respondent intentionally omits is the question, posed on cross examination asking, could the complaining witness have died from "*this blow to the head*" which was answered with a simple "*no*". In context, and

There are however, certain, seemingly intentional, misstatements of fact and misapprehensions of law that are promulgated throughout the State's submission that must be rectified in order to clarify what is at issue.

For instance, Respondent fails to address the most important factual consideration: that communicative and testimonial evidence was extracted directly from the natural person of the accused by virtue of a coercive judicial edict that forced the Petitioner to strip and pose for a photographer. They were not routine "*arrest photographs*" nor were they relevant as "*real or physical evidence*" as the People frequently misrepresent. To repeatedly refer to these photos as "*arrest photos*" is intellectually disingenuous and more an exhibition of wishful thinking than an accurate telling to the Court. These photographs were taken pursuant to a coercive judicial edict that, while extorting communicative and testimonial evidence from the accused, simultaneously required him to actively participate in creating it, five months after his arrest. This Court should not be confused by the State's attempt to deflect Petitioner's claims: it was the photographs taken pursuant to the exemplar order, not those surreptitiously taken outside the presence of counsel at the time of surrender, that confronted Petitioner at trial. (Pet. App. 28a)

Most importantly, the Respondent, in its escapist view of things, ignores altogether the simple fact that the New York Court of Appeals' decision in question permits, even promotes, the forcible extraction of testimonial and communicative evidence by use of this Court's very limited corporeal evidence exception. The Respondent's entire thesis fails to recognize the distinction that is "*drawn under the Fifth Amendment's privilege against self incrimination as one between an accused's 'communications' ' in whatever form', vocal or*

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in light of the many constitutional abuses imparted upon the Petitioner there is no harmless error analysis available to the People as is suggested by their opposition.

physical, and the compulsion which makes a suspect or accused the source of real of physical evidence..." U.S. v. Wade, 388 U.S. 218, 223 (1967) citing Schmerber v. California, *infra*. It is this Distinction, one that limits the state's ability to extract from the natural person evidence relevant to corporeal matters that constitutionally reconciles the corporeal evidence exception. It is not a mechanism constructed to compel an accused to "*speak his own guilt*". Wade at 223. For their departure from this well settled constitutional limitation on the gathering of evidence directly from one accused of a crime, neither the Court below nor the Respondent offer any pertinent authority or constitutionally authorized justification. Importantly, on this very issue the Respondent is eerily silent. What can be said is that the State's opposition demonstrates that the New York Court of Appeals has thrust New York into a significant constitutional controversy and that New York now stands alone amongst the States in its interpretation of the Fifth Amendment's self incrimination clause. This interpretive gap must now be closed. Counselman v. Hitchcock, 142 U.S. 547 (1896).

* * *

In opposing review the State also argues that having knowledge of Petitioner's tattoos enables it to coerce testimonial and communicative evidence from Petitioner and, this coerced extraction of testimonial and communicative evidence is constitutionally available by application of the corporeal evidence exception. Schmerber v. Californis, *infra*[2]. There is no support for this conclusion in any of the authority cited nor is the argument consistent with any previous interpretation of the Fifth Amendment's self-incrimination clause. Indeed, much of what is cited by Respondent

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[2] It is important to note that Respondent, while making the claim that they "*knew*" of the tattoos, never discloses what they knew, how they knew it or fully describes to what extent they knew of the tattoos. This fact, noted by the Court below pertains to any discussion of "*derivative use*" see: U.S. v. Hubbell, 530 U.S. 27, 37, 38 (2000). Pet. App. 8A

recognizes the bright line that once separated corporeal from incorporeal evidence, a line now blurred beyond recognition by the New York Court of Appeals.

* * *

The Fifth Amendment's self incrimination clause has been described by this Court as "*an important advance in the development of our civilization and a privilege enacted by the founders who, while cognizant, and not naïve or disregardful of the interests of justice, made a judgment, and expressed it in our fundamental law*" that, "*to build up a criminal case in whole or in part, with the assistance of enforced disclosures by the accused*" is an evil to be avoided. Likewise, this Court has declared, "*If it be thought that the privilege is outmoded in the conditions of this modern age then the thing to do is to take it out of the Constitution, not whittle it down by subtle encroachments of judicial opinion*" Ullman v. U.S., 350 U.S. 422, 426-428 (1956). It is clear that the State's approach, one adopted by the New York Court of Appeals, constitutes a piecemeal erosion of the privilege and diminishes the privilege as it applies to the natural individual in ways never contemplated by this Court when it conceived the act of production doctrine in Boyd v. U.S., 116 U.S. 616 (1865) and revisited it in later document cases like *Shapiro v. U.S.*, 335 U.S. 1(1947); Fisher v. U.S., 425 U.S. 391 (1976); U.S. v. Doe, 465 U.S. 605 (1984); Doe v. U.S., 487 U.S. 201 (1988); Braswell v. U.S., 487 U.S. 99 (1988); and Hubbell, *supra*. Moreover, the Respondent's view of the corporeal evidence exception unleashes that doctrine into areas well beyond anything ever contemplated by this Court.

Equally unsettling is Respondent's position that knowledge of a "*previous statement*" (@ 25) purportedly made by an accused permits the use of force, even incarceration, to compel him to restate, repeat or affirm those statements. (@ 29) To ignore entirely the historical genesis and defined scope of the privilege and the "*complex values it helps to protect*" by a

strained and inappropriate application of the act of production doctrine and the corporeal evidence exception only serves to undermine "*the constitutional foundation underlying the privilege*" which is to guarantee "*the respect a government, state or federal...must accord to the dignity and integrity of its citizens. To shoulder the entire load...to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors rather than the cruel, simple expedient of compelling it from his own mouth*" Schmerber v. California, 384 U.S. 757, 762 (1966); citing Miranda v. Arizona, 384 U.S. 436, 460 (1966). Accepting Respondent's approach cuts the privilege to its root and embraces the proposition that the State, once possessed of information that an accused expressed an opinion or thought, even years before the commission of a crime, can now physically force him to restate, repeat or affirm that belief in open court and his refusal being met with jail. This is exactly the type of inquisitorial prosecution profoundly rejected by the framers. A precedent like the one advanced by Respondent and set by the New York Court of Appeals sponsors draconian measures to obtain incriminating testimonial and communicative evidence directly from one accused of a crime and impermissibly degrades the privilege. This flatly contradicts the framers' intentions when they included the privilege in the Bill of Rights, for it was they who "*had the most experience with a tendency in human nature to abuse power*" and therefore "*sought to close the doors against like future abuses by law enforcing agencies*" Ullman v. U.S., 350 U.S. 422, 428 (1956). There is no view of the facts relating to the Trial Court's order which compelled this Petitioner to assist in the creation of evidence, evidence that was clearly communicative and testimonial, not real or physical, that avoids the conclusion that the Petitioners Fifth Amendment privilege was transgressed. This is so whether

viewed in the context of *Schmerber's* corporeal evidence exception or *Hubbell's* act of production doctrine.

* * *

While the privilege has been susceptible to expansion and contraction there is no escaping that it was designed to "*protect the accused only from being compelled to testify against himself or otherwise provide the state with evidence of a testimonial or communicative nature*" and that testimonial evidence is found when an accused's communication "*explicitly or implicitly*" relates a factual assertion or discloses information. With this in mind, and remembering the nature of the evidence coerced from Petitioner, the Respondent's belief that the privilege is not "*implicated*" defies constitutional explanation. Here, the view expressed by the state and the lower Court, dispenses with both considerations while their implausible view of the privilege leap-frogs between corporeal and incorporeal evidence in a way never contemplated by the framers or this Court. *Pennsylvania v. Muniz*, 486 U.S. 582 (1990); *Doe v. U.S.*, 487 U.S. 201, 210 (1988); *U.S. v. White*, 322 U.S. 694 (1944). Like the Court of Appeals, it is only by combining strained, narrow readings with unsound logic that Respondent can safely arrive at its destination.

Respondent's view obliterates altogether the historical distinction between the person of the accused and his papers and effects. Now, at least in New York, expressing a thought (as *Schmerber* puts it, "*in whatever form*") entitles the State to menace or coerce directly from the accused a repetition or affirmance of a previously held point of view or expressed thought. According to Respondent, and the lower Court, an accused could now be forced to repeat words (uttered years earlier) in open Court and his refusal to do so could be met with coerced extraction. Their position, I suspect, would not be met with favor by the founding fathers.

It is respectfully submitted that this case presents a critical mass of convergent forces with the State, and its insatiable desire to obtain incriminating testimonial and

communicative evidence, irrespective of its source, and the accused seeking to preserve inviolate his individual liberties being at odds with one another.

That is why this case is so very important.

II. Respondent's Questions Are Easily Dispatched

Insofar as Respondent's counter-questions to the Court, Petitioner asserts that since they are, for the most part, inconsequential to the important constitutional controversy created by the decision below, the questions can, and should, be dispatched with relative ease.

The Respondent posed five questions to the Court and Petitioner responds *in seriatum*.

First, while the lower Court's decision may have some chilling effect on what words citizens choose to affix to their body, neither Petitioner nor the Court of Appeals considered or raised this question. Accordingly, the question, although interesting, is tangential to the proper consideration of this matter.

Regarding Respondent's second question Petitioner, rejects the premise of the question. The photographs in dispute were taken pursuant to a court order relying on the corporeal evidence exception despite the evidence being utterly irrelevant and immaterial for such a purpose. Moreover, there does not exist a more extensive invasion of personal privacy than to be stripped naked and repeatedly photographed.[3] As for the Fourth Amendment analysis suggested by this question, the Petitioner defers to the Fourth Amendment discussion in his Petition.

In answer to Respondent's third question it is submitted that despite a rather convoluted approach to placing importance

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[3] Contradicting Respondent's contention *vis a vis* routine booking is the fact that twice before stripping the accused the prosecutrix asked permission of defense counsel and was twice rejected. Moreover, this search, conducted two hours after surrender, was not performed by the police but rather the prosecutrix and others employed by the District Attorney. The argument supplied by Respondent in answer in their own question is specious.

on the tattoos as "*statements*"(conceding their communicative value and testimonial nature) Respondent's argument provides compelling support for Petitioner's trial contention that there is no theory available to the State that permits the introduction of this evidence. If it is assumed *arguendo* that a tattoo is a "*statement made contemporaneous with its application*" (Respondent's brief @ 25) how then can a statement made seven (7) or even ten (10) years prior to the crime date, not be considered temporally remote and therefor irrelevant. Likewise, they (the tattoos) are also "*logically remote*" and as such are irrelevant. *Tot v. U.S.*, 319 U.S.463 (1943).

By conceding the images in question are communicative and testimonial statements, the Respondent, aside from squarely implicating Petitioner's Fifth Amendment privilege and Sixth Amendment right to counsel, has subjected itself to Petitioner's "*inference within an inference*" reasoning raised at trial and rejected by the Court below. (Pet App.5a, 9a)[4] *U.S. v. Ross, infra.*

The logical analysis advanced by Petitioner at trial, closely follows ancient law and legal theory that dates as far back as the mid-1800's when, by Chief Judge Denio in *People v. Kennedy*, 32 N.Y. 141, 146 (1865), the New York Court of Appeals held that "*circumstantial evidence, I repeat, consists in reasoning from facts that are known or proved, to establish such as are conjectured to exist, but the process is fatally vicious if the circumstances from which we seek to deduce the conclusion depends itself upon conjecture*" (emphasis added) *id* at 145-146.

In *People v. Razeziez,* 206 N.Y.249, 270 (1912), the New York Court of Appeals, borrowing from this Court in *U.S. v. Ross*, 92 U.S. 281, noted that "*they are inferences from*

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[4] New York, like the Federal Courts, has adopted the "*inference within an inference*" rule *vis a vis* circumstantial evidence. *U.S. v. Romano*, 382 U.S. 136 (1965).

inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at conclusions of fact is generally, if not universally inadmissible. No inference of fact or law is reliable, drawn from premises, which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed...it is upon this principle that Courts are daily called upon to exclude evidence as too remote for the consideration of a jury". Therefor, the Respondent's question insofar as relevancy is concerned should be answered in the negative.[5] According to *Ross*, which has been adopted in New York by *Razeziez*, the photos should have been excluded as irrelevant. Quite simply, in order to arrive at the conclusion that the tattoos are relevant, three separate and distinct inferences must be made. First, one must infer that the motive behind being tattooed was, to the exclusion of all other explanations, the self -identification with white supremacist ideology as opposed to say gang membership, peer pressure, drunkenness or even a temporary and passing fascination with an outlaw counter culture[6]. One must then infer that the ideology, one assigned by the People, somehow provides motive and intent for a crime that occurred at least five years later. One is then asked, by yet a third inference, to assume that Petitioner still subscribes to the purported beliefs that form the basis of the first inference. This "*inference within an inference*" scenario renders the conclusion that the tattoos demonstrate motive and intent pure speculation and, as a result thereof, the evidence is irrelevant *U.S. v. Ross*, 92 U.S. 281 (1875).

Concerning Respondent's fourth question, Petitioner asserts that the use of an expert to disclose to the jury what

[5] It should be noted that throughout the State's submission the terms "motive" and "intent" are used interchangeably. This, I submit is a dangerous proposition.

[6] On point is that the State's own expert testified as to reasons other than those attributed to the Petitioner for the existence of these tattoos. Pet. App. 56a-64a.

Petitioner thinks and believes is as repugnant as it is unreliable. Moreover, to use this evidence to connect an accused to entities and organizations that are utterly irrelevant to the proceeding is reprehensible. By projecting the photos on an 8 x 10 foot movie screen and permitting law enforcement the opportunity to attribute actual words to an accused is well beyond the pale of legitimate expert testimony. Moreover, as seen in the discussion of Respondents question "2" the evidence in question has little or no probative value and exceedingly devastating prejudice. Finally, by application of this Courts "*derivative use*" corollary the evidence should have been excluded. U.S. v. Hubbell, 530 U.S. 27, 37, 38 (2000).

Any review of the experts testimony unmistakably demonstrates the inappropriate linking of Petitioner to such entities as "*prison gangs*", "*street gangs*", "*white supremacy*", "*outlaw motorcycle gangs*" and "*skinhead gangs*" all without any factual basis whatsoever. To objectively conclude that the probative value of this evidence outweighed its prejudice (since none of these entities were, as a matter of record, even theoretically relevant to the proceeding) overlooks the facts of the case.

Finally, the Petitioner's reply to Respondent's question five is fully set forth in the Petition and herein. However, Respondent's assertion that the photos, being of Petitioner, did not serve as a self authentication is myopic.[7]

Conclusion

For these reasons and those previously presented the Petition for a Writ of Certiorari.

Respectfully Submitted,
ROBERT J. DEL COL, ESQ.

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[7] A further illustration of this point can be found when, as early as Petitioners arraignment the prosecutrix maintained bias as a motive then states... "*The evidence of that is going to come directly from, among others ,Christopher Slavin who is covered by tattoos that indicate a racial motive.*"